SUPREME COURT, U. S.

JAN 13 1969

CLERK

IN THE

Supreme Court of the United States

OF AMERICA

No. 936

RALPH J. FESTA,
Petitioner

vs.

CITY OF PORTSMOUTH

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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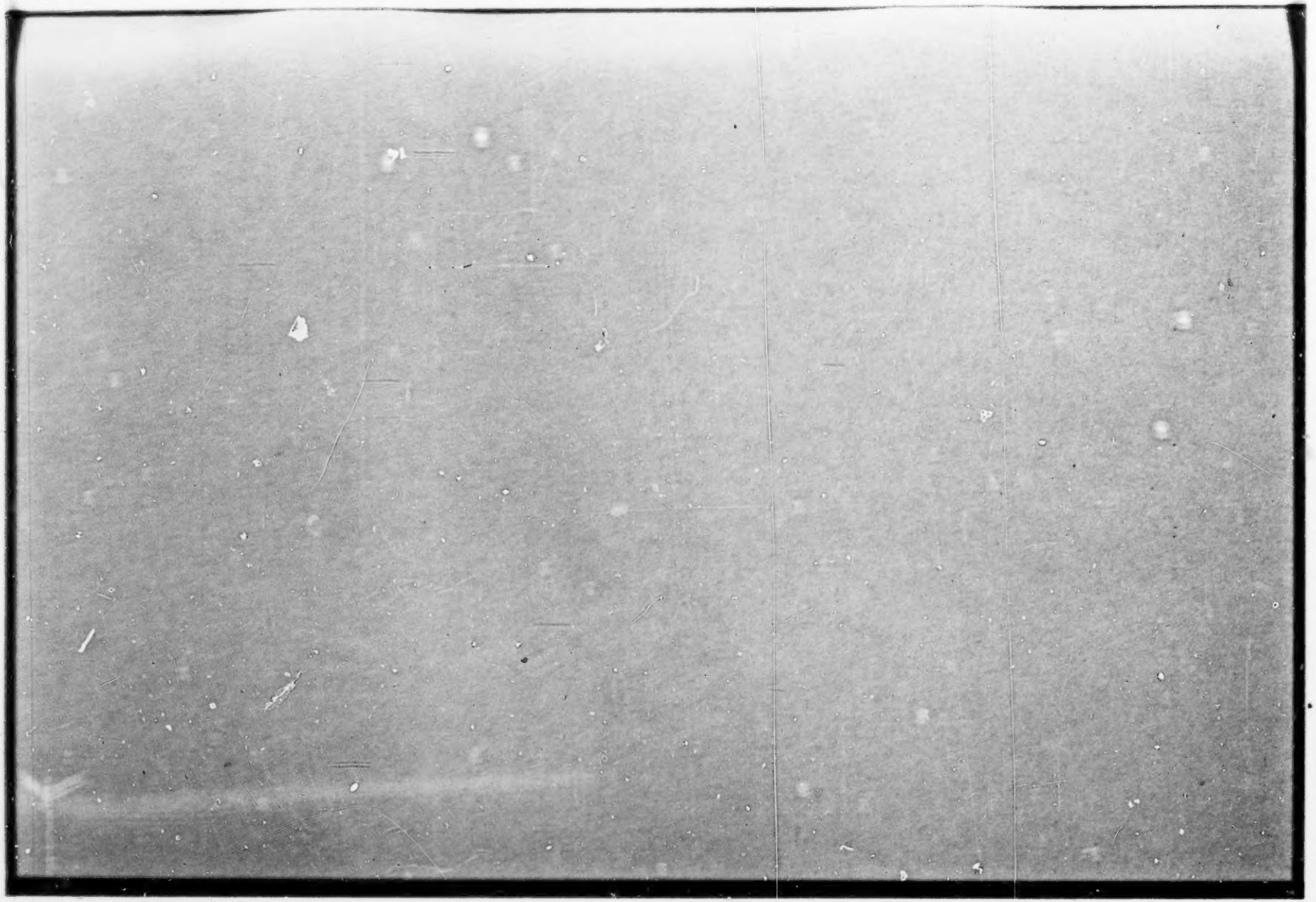

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OPINIONS BELOW

There were no reports of the trial court's decisions.

GROUNDS FOR JURISDICTION

Ralph J. Festa, Petitioner, petitions the Supreme Court of the United States for a writ a certiorari to the final judgment of the Supreme Court of Appeals of the Commonwealth of Virginia, entered on October 16, 1968, denying Petitioner a writ of error to the final judgment

entered in the Court of Hustings for the City of Portsmouth, Virginia, on March 7, 1968.

Petitioner petitions the Supreme Court of the United States for a writ a certiorari pursuant to the provisions of Section 1257 (3) of the United States Code Annotated, since the Virginia Supreme Court of Appeals by its final judgment of October 16, 1968, in denying Petitioner's petition for a writ of error, in effect decided a federal question not in accordance with the applicable decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. That your Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution in that he was denied the right to confront his accusers and cross examine them in a hearing before the City Manager, as provided for in Rule 24 of the Rules of Portsmouth Civil Service Commission.

2. That your Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution when the Civil Service Commission in its hearing went outside the record and considered evidence not presented at the hearing and used this evidence to support charges against Petitioner, thereby denying Petitioner the right to confront his accusers and cross-examine them.

3. That your Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution in that he did not have a fair hearing because of the presence of Colonel H. P. Crowe, Chief of Police for the City of Portsmouth, in the hearing

room next to appellee throughout the Civil Service hearing, and such presence of the Chief of Police intimidated and unduly influenced the police officers testifying on behalf of the appellee and your Petitioner.

4. That your Petitioner was denied due process of law by the refusal of the Clerk of the Court of Hustings for the City of Portsmouth to certify and include as a part of the record in this case the transcript of the hearing before the City Manager of the City of Portsmouth, Virginia, held on October 3, 1967.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution:

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, and property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

STATEMENT OF THE CASE

Petitioner, Ralph J. Festa, hereinafter sometimes referred to as "Captain Festa," a Captain on the Portsmouth City Police Department with almost twenty years of service, and with an unblemished record, was dismissed from the Portsmouth City Police Department, effective September 7, 1967, by a letter from the City Manager of the

City of Portsmouth, Virginia, dated September 13, 1967. At the time of his dismissal, Petitioner was Captain of C-Watch, which was responsible for patrolling a zone between the hours of 1200 and 0800. Approximately a week later, Captain Festa was informed of the charges in writing upon which his dismissal was based.

On October 3, 1967, Captain Festa appeared before the City Manager of the City of Portsmouth for a hearing in accordance with Rule 24 of the Portsmouth Civil Service Commission, which provides inter-alia: "No police officer shall be discharged except for cause on written charges and after an opportunity to be heard in his own defense in the presence of the City Manager."

Pursuant to the procedure provided, Captain Festa came before the City Manager confronted by a recommendation of the Chief of Police that he be discharged (see letter dated September 21, 1967, from the City Manager). If he failed to present any defense to the charges, it was implicit in the procedural provisions that the City Manager would follow the recommendation of the Chief of Police and discharge him. Confronted with these alternatives, Captain Festa testified as to his entire defense to the charges. The City failed to offer any evidence against him, and Captain Festa protested this failure of the City to offer evidence against him, which said protestation is reported in the transcript of the hearing before the City Manager, which said transcript is lodged in the Clerk's Office of the Court of Hustings for the City of Portsmouth, Virginia.

In the presence of the Court Reporter, Captain Festa refuted all charges against him by testifying, and he was then cross-examined by the City Attorney and the City Manager. As a result of the failure of the City to call any

witnesses, Captain Festa was denied the right to confront his accusers and cross-examine them at this hearing. A letter dated January 25, 1968, from counsel of record for the City, which is a part of the record, stipulated that no witnesses appeared against the Petitioner at the hearing before the City Manager.

The City Manager, following this hearing, dismissed Captain Festa from the City of Portsmouth Police Department by a letter dated October 6, 1967. Captain Festa appealed this decision of the City Manager to the Portsmouth Civil Service Commission and a hearing was held on November 1, 1967, before the Portsmouth Civil Service Commission. At the beginning of this hearing before the Civil Service Commission, Counsel for Captain Festa requested that Colonel H. P. Crowe, Chief of Police for the City of Portsmouth, and the man responsible for recommending his dismissal, be excluded from the hearing room, along with other witnesses, on the basis that his presence in the hearing room, and his position of authority over the policemen testifying, would so intimidate and unduly influence these police officers that they would be unable to testify fairly. (See transcript of hearing before Civil Service Commission, Page 3, line 11-25; Page 4, line 1-25; Page 5, line 1-25; Page 6, line 1-25.) Over Petitioner's objection, the Chairman of the Civil Service Commission ruled that the Chief of Police could remain in the room, seated next to Counsel of Record for the City, throughout the entire hearing The only testimony offered by the City or Captain Festa concerning the facts of the charges against him, consisted of police officers. (See transcript Page 4, lines 14-19; Page 5, lines 1-4; Page 6, lines 4-10.) Counsel for Captain Festa noted his exception to the Commissioner's ruling. (See transcript Page 4, lines 14-19; Page 5, lines 5-17; Page 6, lines 4-12).

The hearing then began with Colonel H. P. Crowe being called as the first witness on behalf of the City.

One of the charges against Captain Festa consisted of a charge that he had permitted one officer Sumner to be off duty when he was not entitled to take off because he had no overtime due to him. Colonel Crowe proceeded to testify regarding this aspect of the case. (Page 39, line 24; Pages 40 and 41.) Colonel Crowe was then asked:

> "Colonel Crowe, turning your attention to Officer Sumner once again, have you checked the records and time sheets of your department with respect to overtime leave days accruing to Patrolman Sumner?"

At page 40, line 12, Colonel Crowe answered as follows:

> "Yes. I have checked the record, Captain Festa's work record, the captain of the watch's time sheet, and the official time log."

He was then asked whether his search of the record indicated how much overtime Officer Sumner had coming to him. He answered, over objection of Counsel for Captain Festa. This testimony is as follows:

> "MR. MORRIS: Q. Did your search of these records indicate how many overtime leave days Patrolman Sumner had coming to him for the period from January 1 to August 17?
>
> MR. MOODY: We object to the question on the grounds that the Chief does not keep the records and, secondly, that he should have the records here before us to examine.
>
> CHAIRMAN: I would allow the question as far as your own search is concerned. If you did search the record, what did you find?."

A. I did search the record. I compared Captain Festa's work sheet against the time sheet there and the official time log.

CHAIRMAN: What did you find?

A. I found that Officer Sumner had brought forward from 1966 thirty-two hours, three days overtime. I found no record of where he had made overtime since January 1. However, he had been granted five days or forty hours overtime."

Then, at page 42, line1, Colonel Crowe was permitted to further testify concerning an Order that he had issued pertaining to the administration of overtime. Over the objection of Counsel for Captain Festa (Page 42, line 19) Colonel Crowe's testimony was permitted to stand.

The records and time sheets introduced by the City consisted of four records dating from February 19, 1967 to August 12, 1967, which were introduced as Exhibits 2-5 on Page 37, line 12; Page 38, line 6; Page 39, line 1, and Page 39, line 17. Colonel Crowe's testimony went beyond these records and consisted of testimony concerning Captain Festa's work record, the Captain of the Watch's Time Sheet, and the Official Time Log, which were not admitted into evidence. (Page 40, line 15).

The City Attorney inquired of Colonel Crowe as to his findings from these records (Page 40, line 17), and over the objection of Counsel for Captain Festa (page 40, line 21), the Chairman of the Commission permitted Colonel Crowe to continue his testimony concerning these records which were not introduced at the hearing (Page 41, line 7, previously set forth in the facts herein.)

One of the charges against Captain Festa was that he had permitted Officer Sumner to take off from work when he had no overtime due to him and the issues involved in the above testimony were material to the outcome of the case.

The Chairman of the Civil Commission, in connection with the above matter (Page 42, line 23), over the objection of Counsel for Captain Festa, went outside of the record before the Commission. This testimony is as follows:

"MR. MOODY: Does he have the order tonight with him? I think we are entitled to see the orders and records if he is going into them.

CHAIRMAN: Mr. Moody, we will investigate the record as far as we find it necessary from the results of this hearing.

WITNESS: I believe the Civil Service Commission has a copy of these orders.

CHAIRMAN: That is right."

(Page 43, lines 1-3)

Further, at page 44, line 9-15, again the City, through Colonel Crowe, was permitted to go outside of the record when the City Attorney stated as follows:

MR. MORRIS: Q. Turning once again to your inspection of the records, did they reveal anything to you in connection with holidays received by Officer Sumner?

A. They did.

Q. Will you advise the Commission what your inspection revealed?

A. Officer Sumner's work record maintained by Captain Festa shows that he was off five holidays."

The City at no time offered into evidence any of the records which were testified to in the above-mentioned testimony of Colonel Crowe.

It was further developed, at Page 73, line 17, and Page 74, line 1-7 of the Record, that Colonel Crowe had taken certain statements by way of interrogation from sergeants on the same watch as Captain Festa concerning the charges against him, and that these statements were in possession of the Chairman of the Civil Service Commission, although they were not offered as evidence at the hearing. The testimony concerning this was as follows:

"MR. MOODY: Q. You have had them up there several times?

A. No, sir. One time However, there have been several who came to me who were subpoenaed by the defense

CHAIRMAN: Chief, you did ask them whether there were any events pertinent to this situation prior to this occasion he is referring to?

WITNESS: I don't believe I understand the question.

CHAIRMAN: We have certain statements here which are from sergeants on the same watch, belonging to Captain Festa's watch, with which you did question with respect to his activities?

A. Yes, sir. This was a simple interrogation.

CHAIRMAN: All right."

The Chairman in this instance thereby let it be known that he had in his possession certain statements taken from sergeants on the same watch as Captain Festa, which said statements were taken by Chief Crowe from these officers.

It was further developed at Page 68, line 11-25, that the Chairman of the Commission had in his possession Captain Festa's record:

> "MR. MOODY: We would like to show at the moment two letters one dated August 4, 1959, and the other dated November 4, 1963, relative to Captain Festa, along with other officers, taking part in an outstanding performance in the police department. We feel that it's proper that the Commission should also know about this.
>
> * * *
>
> CHAIRMAN: I don't think it will be necessary, Mr. Moody. We do have Captain Festa's record and it's available to the Commissioners."

After hearing the evidence, the Portsmouth Civil Service Commission concurred in the recommendation of dismissal made by the City Manager.

Then on November 17, 1967, Captain Festa filed his Notice of Appeal to the Court of Hustings for the City of Portsmouth. In his Notice of Appeal, Counsel for Captain Festa, pursuant to Chapter 12, Section 7, of the Charter of the City of Portsmouth, alleged that he was not afforded a fair hearing before the City Manager, as required by Rule 24 of the Rules of the Portsmouth Civil Service Commission in that no evidence was presented and he was not able to confront his accusers or cross-examine them; in that he was prejudiced by the presence of Colonel H. P.

Crowe, Chief of Police for the City of Portsmouth, who was present to observe the testimony of the police officers under his command who testified at the hearing and that the Civil Service Commission went outside of the Record and considered matters not presented at the hearing, in violation of the due process clause of the Fourteenth Amendment in order to sustain the allegations against Captain Festa.

Then the Court of Hustings on February 17, 1968, filed a written opinion affirming the dismissal of Captain Festa by the City and entered Final Judgment on March 7, 1968. On April 10, 1968, Captain Festa filed his Notice of Appeal and Assignments of Error in accordance with Rule 5:1 Sec. 4 of the Supreme Court of Appeals of Virginia, alleging that he was denied due process of law because the City did not offer any evidence or put on any witnesses to prove the charges against him in a hearing before the City Manager; that he was denied due process of law when the Trial Court upheld the Civil Service Commission's ruling permitting Colonel H. P. Crowe to remain present next to the City Attorney in the hearing; and that he was denied due process of law in that he was not able to confront his accusers and cross-examine them in violation of the Fourteenth Amendment when the Portsmouth Civil Service Commission went outside the record and considered matters not presented at the hearing and sustained the charge against the Petitioner.

The Virginia Supreme Court of Appeals on October 16, 1968, affirmed the judgment of the Court of Hustings for the City of Portsmouth by denying Petitioner's Petition for a Writ of Error. Petitioner now is seeking to raise the same issues by a Petition for a Writ a certiorari.

ARGUMENT I

AN OPPORTUNITY TO BE HEARD INCLUDES THE RIGHT TO MEET YOUR ACCUSERS AND CROSS-EXAMINE THEM

Rule 24 of the Portsmouth Civil Service Commission provides as follows:

> "... Any officer or employee in classified service shall not be reduced in rank, or removed, or discharged, except for cause, and upon written charges, and after an opportunity to be heard in his own defense and in the presence of the City Manager."

Captain Festa requested such hearing and with the City Attorney appeared before the City Manager on October 3, 1967.

At the hearing, the City refused to offer any testimony and took the position that if Captain Festa desired to offer any defense to his discharge, he could do so, otherwise it was implicit in the proceedings that he would probably be discharged. In the face of this strong implication that his choice was between testifying as to his defense or accepting his discharge as a certainty, he proceeded to testify in depth as to his defense in hopes of saving his job. This testimony was taken down by a Court Reporter and is filed in the Clerk's Office of the Court of Hustings for the City of Portsmouth, Virginia. Captain Festa, by counsel, protested the failure of the City to offer evidence and argued that he had a right to be faced by his accusers. In spite of this, the City persisted in its position that it would not offer any testimony. The entire proceeding by the City giving Captain Festa the alternative of almost

certain discharge unless he testified, while at the same time the City refused to put on testimony, forced Captain Festa to divulge his entire defense and subjected him to cross-examination without the corresponding opportunity to face and cross-examine his accusers.

The testimony which he gave at that time, in an effort to comply with the proceedings provided, was later used against him in cross-examination by the City Attorney at the Civil Service Commission hearing. (See transcript of Civil Service Commission hearing, Page 253, line 20-25; Page 254, line 8-10).

A fundamental requirement of due process is the "opportunity to be heard." (Armstrong v. Manzo, 380 U.S. 545, at 552 (1965). An opportunity to be heard not only includes the right to notice of the charges, the right to meet the charges with witnesses and evidence, and the right to counsel, but includes the right to be confronted with his accusers and cross-examine them. Thus, a person's right to an opportunity to be heard includes, as a minimum, a right to examine witnesses against him. (In Re Oliver 333, U. S. 257-273 (1948). According to the case of Morgan v. United States, 304 U.S. 1 (1948), a full hearing requires not only the right to present evidence, but a reasonable opportunity to know the claims of the opposing party and to meet them.

Procedural due process requires confrontation and cross examination of those whose word deprives a person of his livelihood. (Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963). Petitioner was not afforded this opportunity before the City Manager. He was dismissed by the City Manager before he was confronted by any of his accusers. The Supreme Court held in Vitarelli v. Seator, 359 U.S. 535 (1959), that the petitioner was

denied due process of law in a security board hearing where no evidence was adduced by the City to support the charges, nor did any witnesses testify against the petitioner. The language in Green v. McElroy, 360 U.S. 474 provides that where governmental action serves to injure an individual, and the reasonableness of the action depends upon the factual findings, the evidence used to prove the government's case must be disclosed so that he has an opportunity to show what is untrue. The above language is applicable to the action of the City Manager of the City of Portsmouth when he dismissed Petitioner without an opportunity to be heard.

In this case, if the discharge is upheld, Captain Festa will lose the benefits of almost twenty years as a police officer and certainly those decisions requiring due process when deprivation of a person's livelihood is involved are made applicable. Basic and long followed principles of law are involved which will effect every police officer wherever he may be who is faced with charges wherein the City takes the position that he is not entitled to the normal judiciary proceedings of due process. Due process is most assuredly denied when one is faced with procedural provisions wherein a City Manager has the recommendation of the Chief of Police of the City to discharge a police officer, unless he can show cause why he should not be so discharged, and at the same time, the City refuses to offer any testimony to substantiate the charges against him at a hearing before the City Manager in accordance with the Rules of the Civil Service Commission of that City. In effect, this places the burden on the police officer and he is thereby compelled to testify. Under such circumstances, a policeman is coerced into testifying even though his rights are denied by the refusal of the City to offer

evidence against him. The combination, in effect, compells the officer to testify and subject himself to cross-examination. This, coupled with the refusal of the City to offer evidence, places the police officer in an inherently unfair position and falls far short of due process.

ARGUMENT II

THE PRESENCE OF H. P. CROWE, CHIEF OF POLICE, AT THE SIDE OF COUNSEL OF RECORD FOR THE CITY THROUGHOUT THE ENTIRE CIVIL SERVICE COMMISSION HEARNG DENIED PETITONER DUE PROCESS OF LAW

The presence of Colonel H. P. Crowe, Chief of Police, City of Portsmouth, at the counsel table of Appellee, during Petitioner's hearing before the Civil Service Commission denied Captain Festa due process of law. Colonel H. P. Crowe was the party who orginally filed the charges of malfeasance and dereliction of duty against the Petitioner. His presence before the Commission should have been limited for the sole purpose of testifying as to the reason of these charges and why he preferred them. However, Chief Crowe's presence at the counsel table, facing the testifying police officers throughout the hearing, unduly emphasized to the Civil Service Commission that this was a proceeding of Colonel H. P. Crowe, Chief of Police, against Captain Festa, rather than a proceeding by the City of Portsmouth to ascertain the fitness of an employee. The Commission, instead of hearing the proceeding between the City of Portsmouth, in reference to the fitness of one of its employees, was actually hearing an adversary proceeding between the Chief of Police and the Petitioner

in which there had to be a result in favor of one man or the other. Secondly, one of the defenses in this case was that certain practices had been perpetuated and followed in the Police Department, while contrary to written regulations, had been accepted and followed, without objection by higher authority for many years, and that Captain Festa had acted in accordance with such customs. (See Record, Page 164, line 18; Page 165, line 18-23; Page 166, line 4-7; Page 167, line 18-25; Page 168, line 1-3.) The presence of Colonel H. P. Crowe facing the witnesses for Captain Festa, many of whom were policemen, holding both high and low ranks, subjected them to undue pressure in testifying as to the customs generally followed in the Police Department, when such customs were contrary to regulations relied upon by the City to support the charges against Captain Festa. These police officers, testifying before a Chief of Police, when they were subject to his command and discipline, denied them the opportunity of free expression in accordance with due process

ARGUMENT III

PETITIONER'S DISMISSAL WAS BASED ON EVIDENCED OUTSIDE OF THE RECORD

Your Petitioner was denied due process by the Civil Service Commission going outside of the record and considering matters not presented at the hearing, which said matters were relied upon by the City to support the charges against Petitioner. Petitioner was charged with crediting Officer Sumner for having worked certain days when Officer Sumner was not working. Captain Festa's answer to this charge was that Officer Sumner was entitled to certain overtime which he had not taken and

that he was taking off this overtime. It was also shown that this was an acceptable practice for many years in the Portsmouth City Police Department. (See transcript, Page 164, line 18; Page 165, line 18-23; Page 166, line 4-7; Page 167, line 18-25; Page 168, line 1-3.)

In an effort to prove these allegations against Captain Festa, Colonel Crowe, Chief of Police, over the objections of Captain Festa's counsel, was permitted to go outside of the record and testify to his findings from an inspection of certain records which were not presented in evidence at the hearing. He then testified that, according to such records, Officer Sumner did not have any overtime coming to him, thereby refuting Captain Festa's defense by means of placing in evidence the contents of records not presented at the hearing.

To further bolster his testimony, Colonel Crowe referred to and testified concerning a written order which he had issued, which said order was not presented at the hearing. (Page 42, line 1-9). Thus, Chief Crowe testified to conclusions from his inspection of records and his inspection of an order, neither of which were admitted into evidence, although called for by Petitioner at the hearing. The only records submitted into evidence were four time sheets (February 19-February 25; February 26-March 4; July 30-August 5; August 6-August 12.) while Colonel Crowe's testimony went beyond this and testified to various other records and orders. (testimony previously set forth.) Without the introduction of these records into evidence, the Petitioner was unable to cross examine Chief Crowe on such records, or to be faced with these records which were used against him. Counsel strenuously objected to the testimony, but the Chairman of the Commission in

response to Counsel's request to see certain orders and records, replied:

> "We will investigate the record as far as we find it necessary from the results of this hearing."

Not only did the Commission permit the Chief to testify to the contents of such records, which were not presented, but further stated that the Commission would take the liberty of looking at the records referred to if "we find it necessary."

Clearly, the above fell far short of due process and would jeopardize the constitutional rights of any policeman who may be faced with similar hearing unless the Court grants a writ a certiorari in this case.

The Commission in its upholding of the City discharging Captain Festa failed to set forth the grounds upon which the discharge was upheld. Therefore, it is not shown in the record that the discharge was not based upon the "outside information" brought to the attention of the Commission through the testimony of Colonel Crowe and through the Commission itself taking the liberty of referring to and considering certain records which were not presented at the hearing.

A review Court, reviewing the factual findings of the Commission, could not determine whether the finds of the Portsmouth Civil Service Commission had a sufficient evidential foundation to support it, where the Commission has referred to evidence not presented at the hearing. (Ohio Bell Telephone v. Public Utilities Commission of Ohio, 301 U.S. 392, 303 (1937). Due process requires that in an adjudicative administrative hearing, in which the facts are disputed, the submission of all the evidence into the record so that it is subject to cross-examination

and rebuttal is necessary. (Interstate Commerce Commission v. Louisville and Nashville Railroad, 227 U.S. 85, at page 93 (1912). The Supreme Court stated that in an administrative body of a "quasi" judicial nature: "All parties must be fully apprised to the evidence to be submitted or to be considered and must be given an opportunity to cross-examine witnesses and inspect documents." (Interstate Commerce Commission v. Louisville and Nashville Railroad, supra.) A hearing is not judicial unless the evidence can be known. (Ohio Bell Telephone Company v. Public Utilities Commission, supra.) The recent Supreme Court case of Hannah v. Larche, 303 U.S. 420 (1966) held that when a governmental agency adjudicates or makes binding determinations which affect the legal rights of individuals, it is imperative that the agencies use the procedure which has been traditionally associated with judicial process, i.e., the right to cross-examine.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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VIRGINIA: IN THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH HELD ON THE 17TH DAY OF FEBRUARY, 1968

RALPH J. FESTA,
Plaintiff

vs.

CIVIL SERVICE COMMISSION,
Defendant

ON APPEAL

Law Docket #5377

MEMORANDUM AND OPINION

The matter of the discharge of Mr. Ralph J. Festa as a Captain on the Portsmouth, Virginia, Police Department was heard on appeal from the ruling of the Civil Service Commission of this city on Saturday, February 10, 1968, and taken under advisement at the conclusion of the hearing. The Court at that time stated it would render its judgment in this matter on Saturday, February 17, 1968. Thusly, we are here today.

The Civil Service Commission at the request of Mr. Festa held an open hearing on November 1, 1967, concerning his previous dismissal by the City Manager after a hearing and upon the recommendation of the Chief of Police for violation of Chapter XII, Section 6 (a), (b) and (g), of the Charter of City of Portsmouth; Chapter XII being entitled 'Classified Civil Service'. The effective date of dismissal was September 7, 1967. The Civil Service Commission concurred in the action of the City Manager.

Chapter XII, Section 3 (e) of the Charter of City of Portsmouth sets forth as follows: "All hearings and investigations before the Commission, shall be governed by this act and by the rules and practice and procedure to be adopted by the Commission, and in the conduct thereof the Commission shall not be bound by the technical rules of evidence. No informality in any proceeding or hearing, or in the manner of taking testimony before the Commission, shall invalidate any order, decision, rule or regulations made, approved or confirmed by the Commission"

For the authority vested in this Court on appeal from an order of discharge reference is made to Chapter XII, Section 7, of the Charter of the City of Portsmouth, wherein is set forth as follows: "The Court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner; provided, however, that such hearing shall be confined to the determination of whether the order or judgment of removal, suspension, demotion or discharge made by the appointing power and concurred in by the Commission, was or was not made in good faith for cause, or was or was not for political or religious reasons, and no appeal to such court shall be taken except upon such ground or grounds".

Admittedly by counsel for both parties we are not concerned with the question of politics or religion. Thus, the issue resolves itself as to whether or not the order of discharge made by the appointing power and concurred in by the Commission was or was not made in good faith for cause?

Briefly, the evidence before the Court discloses that the morning of September 7, 1967, Mr. Festa was on duty as Captain of the Watch and in such capacity was the

senior police officer in charge. That while on duty in such capacity he absented himself, although remaining on the air, for more than two hours in the early morning. About 4:30 a.m. when asked for his location he stated to be at Jackson and Lee Streets, which do not intersect but parallel, when in fact he was in a residence numbered 112 Pinners Street some five to six blocks away. At this time the Chief of Police was seated in his car some 75 feet behind Captain Festa's car, car #23, which was parked on Pinners Street. When Captain Festa was notified to return to headquarters it was nine minutes before he appeared on the porch in front of 112 Pinners Street. He then drove to the corner of Hill Street and turned left before turning his lights on. When questioned concerning his conduct Captain Festa said he was on a stake out concerning a uniformed police officer fooling around over there.

There was further evidence that Captain Festa on several occasions allowed a patrolman not entitled to overtime leave to be off duty a full day at the time when in fact he was recorded as working the full watch.

From the aforegoing brief resume of the evidence, and after carefully reviewing the various points raised by counsel, it is the considered opinion of this Court that the order of discharge made by the appointing power and concurred in by the Civil Service Commission was made in good faith for cause.

R. WINSTON BAIN

Judge

VIRGINIA: IN THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

R. J. FESTA

V.

CIVIL SERVICE COMMISSION

ORDER

This day came the above named parties, by counsel, upon the appeal of R. J. Festa from the judgment of the Civil Service Commission of the City of Portsmouth, Virginia, pursuant to Chapter XII, Section 7 of the Charter of the City of Portsmouth, Virginia, (Chapter 246, Acts of Assembly, 1942) and the matter was fully argued by counsel: and

it appearing to the Court upon mature consideration that the judgment of the Civil Service Commission of the City of Portsmouth was made in good faith for cause and that no constitutional questions are presented;

it is ADJUDGED, ORDERED and DECREED that the judgment of the Civil Service Commission of the City of Portsmouth rendered in this matter November 8, 1967, be and the same hereby is affirmed, to which ruling and action of the Court R. J. Festa, by counsel, objects and excepts.

Entered this 7th day of March, 1968

R. WINSTON BAIN
Judge

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

The petition of Ralph J. Festa for a writ of effor to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 7th day of March, 1968, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and the Civil Service Commission of the City of Portsmouth was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said hustings court.

A Copy,
Teste:

H. TURNER
Clerk

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IN THE

Supreme Court of the United States

OF AMERICA

No. 936

RALPH J. FESTA,
Petitioner

vs.

CITY OF PORTSMOUTH

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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IN THE

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No. 936

RALPH J. FESTA,
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vs.

CITY OF PORTSMOUTH

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Petition for Writ of Error be dismissed?
2. When petitioner had a formal hearing before the Civil Service Commission in full conformity with due process of law, did the failure of petitioner to have a formal hearing before the City Manager at an earlier stage of the proceedings deny him due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution?
3. Was the dismissal of petitioner based upon evidence outside the record so as to deny him due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution?
4. Did the exclusion of the Chief of Police from the order separating witnesses to assist the respondent in the presentation and conduct of its case deny petitioner due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution?
5. Was petitioner denied due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution by the refusal of the Clerk of the Court of Hustings for the City of Portsmouth to certify and include a transcript of statements made before the City Manager as a part of the record?

STATEMENT OF THE CASE

By letter from the City Manager of the City of Portsmouth dated September 13, 1967 petitioner was suspended from the Portsmouth Police Department effective September 7, 1967 pending investigation. By letter dated Septem-

ber 21, 1967 the City Manager advised the petitioner that his dismissal had been recommended based upon the charges set forth therein and that he could appear and reply to the charges September 29, 1967. After continuance, the petitioner appeared in the office of the City Manager on October 3, 1967 accompanied by counsel and in the presence of the City Manager replied unsworn to the charges made and introduced statements in his behalf. No witnesses were presented by respondent or petitioner. By letter dated October 6, 1967, petitioner was dismissed by the City Manager effective September 7, 1967, based on the charges set forth therein.

In accordance with established procedure and as a matter of right, petitioner appealed the decision of the City Manager to the Civil Service Commission of the City of Portsmouth. On November 1, 1967, a de novo public hearing was held by the commission at which the respondent presented all evidence relied upon and at which petitioner appeared, represented by counsel, and presented all evidence in his behalf and exercised his full right of cross-examination.

At the hearing before the Civil Service Commission, Colonel H. P. Crowe, Chief of Police, was excluded from the rule to separate witnesses. Colonel Crowe was the lead witness for the respondent and after testifying, he remained at the table with counsel for the respondent and assisted counsel in the presentation and conduct of respondent's case.

One of the charges against petitioner was that he had improperly granted overtime leave to one Officer Sumner when he had no overtime due. During the course of his

testimony, Colonel Crowe testified with respect to information obtained for an examination and comparision of certain departmental time records. (Transcript: Page 39, Line 24; Page 41, Line 12). The subject records consisted of captain of the watch time sheets, captain of the watch work record and the official time log. (Transcript: Page 40, Lines 12-14; Page 41, Lines 3-5).

On direct examination of Colonel Crowe, the four pertinent captain of the watch time sheets were identified and explained (Transcript: Page 31, Lines 11-25) and introduced into evidence as repondent's Exhibits 2-5. (Transcript: Page 37, Line 12; Page 38, Line 6; Page 39, Line 1; and Page 39, Line 17). Although the pertinent captain's work record and time log were not formally introduced on direct, they were introduced on cross-examination at the suggestion of petitioner's counsel (Transcript: Page 66, Lines 4-14) as follows:

> "WITNESS: Mr. Chairman, I have not testified to any records that are not readily available.
>
> MR. MOODY: I would like to see them if they are available. (Witness hands folded to Mr. Williams).
>
> WITNESS: This is Captain Festa's work sheet; this is Officer Sumner's record. This is a photostat we made the 17th of August. This is the captain's work sheet and I have to assume that he transposes the information from here to here."

The fact that the records introduced were those upon which Colonel Crowe had based his previous testimony was confirmed on redirect (Transcript: Page 67, Lines 3-9), and the commission then recessed to consider the records introduced (Transcript: Page 67, Lines 10-17) in the following manner:

"EXAMINED BY MR. MORRIS:

Q. Colonel Crowe, was the testimony that you gave with reference to the holidays of Officer Sumner and overtime and leave time based on these records?

A. These records, yes, sir. We can compare them here.

THE CHAIRMAN: We will do this at a later time, not at this particular time. We would like to have this available to us.

WITNESS: This is the official time log here. This is something that I would like to take back with me because we have to have it tomorrow.

THE CHAIRMAN: We will take a recess right now and look at these records."

On direct examination Colonel Crowe also testified that it was the responsibility of the captain of the watch to maintain the time sheets (Transcript: Page 31, Lines 19-22) and that the captain of the watch was in charge of granting leave. (Transcript: Page 41, Lines 16-18). In expanding upon previous testimony in answer to a question of Commissioner Stewart, Colonel Crowe also mentioned that he had written an order to that effect. (Transcript: Page 42, Line 1-9).

During the hearing, statements made by certain witnesses and relied upon by respondent were entered in evidence by stipulation and counsel for petitioner cross-examined on the basis of the statements introduced. (Transcript: Page 117, Lines 3-21; Page 140, Lines 13-20; Page 144, Lines 14-17; Page 147, Lines 5-12; Page 263, Lines 18-20).

Also during the hearing, at the suggestion of counsel for petitioner, the commission indicated it would examine petitioner's permanent personnel record for certain letters of commendation and place them in evidence for petitioner. (Transcript: Pages 68-70).

After hearing all the evidence, the commission postponed decision and the hearing was adjourned. On November 8, 1967 the commission rendered its decision concurring in the action of the City Manager.

On November 17, 1967 petitioner filed his Notice of Appeal of the commission's decision to the Court of Hustings for the City of Portsmouth in which he alleged certain grounds of appeal. Petitioner did not specifically or directly allege violation of the due process clause of the Federal Constitution therein. After review, the Court of Hustings for the City of Portsmouth filed a written opinion dated February 17, 1968 affirming the decision of the Civil Service Commission and final judgment was entered March 7, 1968.

On April 10, 1968 petitioner filed Notice of Appeal and Assignments of Error to the judgment of the Court of Hustings for the City of Portsmouth in which petitioner alleged for the first time denial of due process in violation of the Fourteenth Amendment of the Federal Constitution. Petitioner subsequently filed his Petition for Writ of Error with the Virginia Supreme Court of Appeals and on October 16, 1968 the Court denied petitioner's Petition for Writ of Error.

ARGUMENT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED.

The Petition for Writ of Certiorari heretofore filed by the petitioner should be dismissed on the following grounds:

A. The Judgment Of The Virginia Supreme Court Of Appeals Rested Upon Independent And Adequate Non-federal Grounds.

Although the Virginia Supreme Court of Appeals delivered no written opinion in denying petitioner's Petition for Writ of Error, the judgment of the Court can be sustained on independent and adequate non-federal grounds. (See respondent's Arguments II.A, III, and IV). "Where the highest court of the state delivers no opinion and it appears the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Steimbridge v. Georgia*, 343 U. S. 541 at 547 (1952). If the judgment of the state court is fairly and substantially supported on non-federal grounds and there is no indication of an attempt to evade constitutional issues its decision is not reviewable by the Federal Supreme Court.

Wolfe v. State of N. C., 364 U. S. 177 (1960).

Holley v. *Lawrence*, 317 U. S. 518 (1943), appeal dismissed 317 U. S. 605 (1943).

B. The Averments of Petitioner Present No Substantial Federal Question.

The asserted federal questions of the petitioner are devoid of merit and unsubstantial either because precluded by previous authority or because of their frivolous nature. (See respondent's Arguments II, III and IV). In such cases a motion to dismiss is properly allowed. *Deming v. Carlisle Packing Company*, 226 U. S. 102 (1912).

ARGUMENT II

PETITIONER HAD A HEARING IN FULL CONFORMITY WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION BEFORE THE CIVIL SERVICE COMMISSION.

On November 1, 1967, subsequent to his appearance before the City Manager and in accordance with established practice and procedure, Virginia Acts of Assembly, Ch. 246, Sec. 7, pp. 361-362 (1942), petitioner had a full and complete de novo public hearing before the Civil Service Commission of the City of Portsmouth. At this hearing respondent presented all evidence relied upon to support his dismissal and petitioner appeared, represented by counsel, and presented all evidence in his behalf and exercised in full his right to cross-examination.

The fundamental objective of due process of law is to protect rights against aribtrary action of public officials. 2 Am. Jur. 2d, Administrative Law §148 (1962). This objective was fully served through petitioner's de novo hearing before the Civil Service Commission. There is no violation of due process of law in making an administrative determination without a formal hearing if such a hearing

may be had and in fact was had upon application to an administrative tribunal.

Gonzales v. *United States*, 364 U.S. 59 (1960).

Bragg v. *Weaver*, 251 U.S. 57 (1919).

Flory v. *Smith*, 145 Va. 164, 134 S.E. 360 (1926).

It is universally held that due process of law does not require a hearing at the initial stage of a proceeding, but only that the interested party be given a hearing at some stage of the proceeding before the determination becomes final or irrevocable.

16A C.J.S., Constitutional Law, §622 (1956).

16 Am. Jr. 2d., Constitutional Law, §576 (1964).

NAACP v. *Committee*, 199 Va. 665, 101 S.E. 2d 580 (1958); vacated on other grounds 358 U.S. 40 (1958).

Ewing v. *Mytinger & Castleberry*, 339 U.S. 594 (1950).

Lichter v. *United States*, 334 U.S. 742 (1948).

A. Whether Or Not Rule 24 Required A Formal Hearing Before The City Manager Was A Question Of Construction For The State Court.

The petitioner had a complete hearing before the Civil Service Commission in accordance with established procedures, Virginia Acts of Assembly Ch. 246, Sec. 7 pp. 361-362 (1942), and in full conformity with due process requirements. Under these circumstances, whether or not Rule 24 of the Civil Service Regulations required an additional formal hearing before the City Manager in excess of constitutional requirements was merely a question of construction and interpretation in the light of other provisions. The construction of state laws is the exclusive responsibility of the state courts, *Speiser* v. *Randall*, 357 U.S. 513 (1958). What state enactments may mean and the extent

to which any provision may be limited by another are questions upon which the highest court of the state has final word, *Musser* v. *State of Utah*, 333 U.S. 95 (1948), and the state courts' construction must be accepted by the United States Supreme Court. *Cramp* v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961). In denying petitioner's Writ of Error and affirming the judgment of the lower court, the Virginia Supreme Court of Appeals necessarily determined that Rule 24 of the Civil Service Commission Regulations did not require a formal hearing before the City Manager and thus conclusively resolved the issue against petitioner.

ARGUMENT III

THE EXCLUSION OF ONE WITNESS FROM THE ORDER OF SEPARATION TO ASSIST RESPONDENT IN THE PRESENTATION OF ITS CASE WAS IN THE DISCRETION OF THE HEARING TRIBUNAL AND WAS NOT VIOLATIVE OF DUE PROCESS.

Due to the nature of the issues involved the presentation of respondent's case and meaningful cross-examination necessitated ready access to detailed information with respect to the rules, orders, past practices and operations of the police department beyond the personal knowledge of counsel. Under these circumstances the exemption of the Chief of Police from the order of separation was in the discretion of the hearing tribunal.

Schoppel v. *United States*, 270 F.2d 413 (1959).
Johnston v. *United States*, 260 F.2d 345 (1958), cert. denied 360 U.S. 935 (1959).

Powell v. *United States*, 208 F.2d 618 (1953), cert. denied 347 U.S. 961 (1954).

Hampton v. *Commonwealth*, 190 Va. 531, 58 S.E. 2d 288 (1950), cert. denied 339 U.S. 989 (1950).

Burford v. *Commonwealth*, 179 Va. 752, 20 S.E. 2d 509 (1942).

The exercise of such discretion cannot be challenged unless it clearly appears from the record that discretion has been abused to the prejudice of the complaining party.

Powell v. *United States*, 208 F.2d 618 (1953), cert. denied 347 U.S. 961 (1954).

Near v. *Commonwealth*, 202 Va. 20, 116 S.E. 2d 85 (1960), cert. denied 365 U.S. 873 (1961).

Hampton v. *Commonwealth*, 190 Va. 531, 58 S.E. 2d 288 (1950), cert. denied 339 U.S. 989 (1950).

Burford v. *Commonwealth*, 179 Va. 752, 20 S.E. 2d 509 (1942).

The Chief of Police was the lead witness for the respondent. (Transcript: Page 13, Line 22). After testifying, he remained at the table with counsel for respondent and assisted counsel in the presentation and conduct of the case. The record is totally devoid of evidence that the presence of the Chief of Police served to intimidate witnesses or prejudice the rights of the petitioner. In no instance does it appear a witness was less than fully responsive. Moreover, the only evidence bearing on the issue negatives intimidation and instead reflects a scrupulous effort to avoid it. (Transcript: Page 73, Lines 7-14).

The mere assertion of a denial of constitutional guarantees standing alone is not sufficient. There must at least be color of ground for such assertion, *Hamblin* v.

Western Land Co., 147 U.S. 531 (1898), and the question presented must be a substantial one.

Honeyman v. *Hanan*, 300 U.S. 14 (1937).

Seaboard Air Line Ry. Co. v. *Watson*, 287 U.S. 86 (1932).

Deming v. *Carlisle Packing Co.*, 226 U.S. 102 (1912).

The failure of petitioner to meet either of these criteria is attested by the fact that his contention is not supported by authority.

ARGUMENT IV

PETITIONER'S DISMISSAL WAS BASED ON COMPETENT EVIDENCE PROPERLY BEFORE THE TRIBUNAL.

At the hearing before the Civil Service Commission, all evidence relied upon by respondent to support the dismissal of petitioner was presented to the commission. The record is totally devoid of evidence that the commission based its judgment on evidence other than that properly placed before it at that time. A contrary contention is founded upon no more than surmise and conjecture.

One of the charges against petitioner was that he had improperly granted overtime leave to one Officer Sumner when he had no overtime due. During the course of his testimony, Colonel Crowe testified with respect to information obtained from an examination and comparison of certain departmental records. (Transcript: Page 39, Line 24; Page 41, Line 12). The subject records consisted of captain of the watch time sheets, captain of the watch work records and the official time log. (Transcript: Page 40, Lines 12-14; Page 41, Lines 3-5).

On direct examination of Colonel Crowe the four pertinent captain of the watch time sheets were identified and explained (Transcript: Page 31, Lines 11-25) and introduced into evidence as respondent's Exhibits 2-5 (Transcript: Page 37, Line 12; Page 38, Line 6; Page 39, Line 1; and Page 39, Line 17). Although the pertinent captain's work record and time log were not formally introduced on direct, they were introduced on cross-examination at the suggestion of petitioner's counsel with his full knowledge, identified and explained (Transcript: Page 66, Lines 4-14), and confirmed to be the records upon which Colonel Crowe had based his earlier testimony. (Transcript: Page 67, Lines 3-9). The commission then recessed to consider the records (Transcript: Page 67, Lines 16-17). All of these incidents took place in the presence of counsel without objection (Transcript: Pages 66-67).

It is thus clear that the records petitioner alleges were outside of the record and improperly considered by the commission were properly placed before the commission with full knowledge of petitioner's counsel and considered by the commission during the course of the hearing. The statement of the commission, made before introduction, that it would investigate those records as far as they found it necessary was without effect.

On direct examination, Colonel Crowe also testified that it was the responsibility of the captain of the watch to maintain the time sheets (Transcript: Page 31, Lines 19-22) and that the captain of the watch was in charge of granting leave. (Transcript: Page 41, Lines 16-18). In expanding upon previous testimony and in answer to a question of Commissioner Stewart, Colonel Crowe also mentioned that he had written an order to that effect.

(Transcript: Page 42, Lines 1-9). The direct testimony of the Chief of Police was primary and competent evidence. He testified under oath to matters within his own knowledge and was fully subject to cross-examination. The mere fact that a writing has been made does not render direct evidence incompetent where proof of the writing itself is not in issue. *Doman* v. *Baltimore and O. Ry. Co.*, 125 W. Va. 8, 22 S.E. 2d 703.

When the record contains competent evidence fully sufficient to serve as a basis of decision of the issue concerned, without more, it should not be boldly assumed without support in the record that the tribunal based its decision on other evidence outside of the record. Moreover, engaging for a moment in pure speculation and conjecture with petitioner and assuming that the commission examined the written order, the petitioner could have in no way been prejudiced. If the order had been inconsistent with respondent's evidence it could only have benefited petitioner. On the other hand, if it had been consistent with respondent's evidence it would have been merely corroborative and harmless.

Under the above circumstances, if there were grounds for objection to the consideration of the evidence discussed they would relate solely to the technical "formality" of introduction and numbering of the records in the first instance and to the technical competency of the evidence in the second. But, the statutes governing hearings before the Civil Service Commission do not require compliance with technical rules of evidence. Virginia Acts of Assembly, Ch. 246, Sec. 7 pp. 361-362 (1942). Nor, are administrative tribunals generally required to comply with such rules, *Humphrees* v. *Boxley Bros. Co.*, 146 Va. 91, 135 S.E.

890 (1926); 2 Am. Jur. 2d, *Administrative Law* §344 (1962), and the mere fact that they are not followed does not render a hearing unfair, *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923), and falls far short of a denial of due process.

ARGUMENT V

THE TRANSCRIPT OF PETITIONER'S APPEARANCE IN THE CITY MANAGER'S OFFICE WAS PROPERLY EXCLUDED.

The fourth assignment of petitioner was not argued and is considered abandoned. However, even had it not been abandoned it could not stand for the following reasons:

(1) The petitioner was not under oath.

(2) The transcript was not certified by the officer before whom it was taken.

(3) The transcript did not constitute part of the record before the Civil Service Commission, or the Court of Hustings for the City of Portsmouth, or the Virginia Supreme Court of Appeals.

(4) The Clerk of the Court of Hustings for the City of Portsmouth had no authority to certify or transmit it.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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